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January 27, 2022

VIA E-MAIL

The Honorable Christopher J. Burke
United States District Court
for the District of Delaware
844 N. King Street
Wilmington, DE 19801

**Re: *Sysmex Corp. et al v. Beckman Coulter, Inc.,*
 C.A. No. 19-1642-RGA-CJB**

Dear Judge Burke:

I write on behalf of Sysmex with respect to BCI's Notice of Withdrawal (D.I. 446).

Through its Notice of Withdrawal, BCI seeks to modify the summary judgment record after briefing has been completed. Sysmex never agreed that BCI could alter the record and repeatedly told BCI that it would object to any such modifications, particularly if they prejudiced Sysmex. BCI first raised the possibility of filing replacement versions of D.I. 416-420 on December 7. Ex. A at 3. At that point, Sysmex's Answering Brief was due on December 21. Accordingly, Sysmex advised BCI that it was "concerned that BCI will be making changes that impact our answering briefs without giving us adequate time to consider them.... We are certainly willing to consider them, provided BCI provides us with its draft proposed exhibits by December 9." *Id.* at 2. The parties then negotiated the stipulation referenced in BCI's Notice of Withdrawal and BCI agreed "to try to accelerate preparation of the excerpted version of our exhibits." *Id.* In agreeing to the stipulation, Sysmex noted its disagreement with BCI's belief that it could amend exhibits without Sysmex's prior review and approval. *Id.* at 1.

The parties then filed Answering and Reply Briefs without BCI mentioning anything about replacement exhibits. Rather than provide additional attachments, Sysmex relied on the documents BCI already filed with the Court in its remaining briefing. Then, on Saturday, January 22, having been silent for over a month, BCI sent its proposed revised exhibits from its Opening Brief. Sysmex objected on January 24. Ex. B. BCI never responded to Sysmex's objection and never requested (or held) a meet and confer. Instead, BCI filed its Notice of Withdrawal.

Sysmex respectfully requests that the Court ignore BCI's revised exhibits and instead require BCI to rely on the exhibits filed at D.I. 416-420. BCI's actions are prejudicial to Sysmex in several ways. First, BCI proposes to provide excerpts that highlight the portions BCI relied upon and not the portions Sysmex relied upon. Had BCI done that to begin with, Sysmex may have submitted different and highlighted exhibits with its Answering Brief. Second, BCI has

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represented that its excerpts include everything cited by Sysmex but BCI has not provided a chart of any verification showing that. Sysmex should not be put to the burden to confirm BCI has properly excerpted the exhibits.

While we appreciate BCI may have been attempting to make things easier on the Court, Sysmex respectfully submits that BCI should have done that at the time of filing its original exhibits or in early December when it first raised the prospect of modifying previously filed exhibits. Sysmex proceeded with briefing on the basis of the record as filed, and BCI should not be able to change the record at this point. And BCI's failure to even attempt to meet and confer with Sysmex is additional grounds to deny BCI's attempted substitution.

Sysmex respectfully requests that the Court clarify that D.I. 416-420 remain the operative exhibits and that BCI should comply with any redaction or other obligations as necessary.

Respectfully,

/s/ Kelly E. Farnan

Kelly E. Farnan (#4395)

Attachments

cc: All Counsel of Record (w/e) (CM/ECF)